NO. 13-20-00143-CV

IN THE COURT OF APPEALS

THIRTEENTH APPELLATE DISTRICT OF TEXAS

CORPUS CHRISTI-EDINBURG, TEXAS

DIANA GARZA, Appellant

v.

JOSE OCHOA, Appellee

Appeal from the 105th District Court of Kleberg County, Texas,
Cause No. 18-417-D
The Hon. Jack W. Pulcher, Presiding Judge

APPELLANT'S BRIEF

Randall E. Turner
Law Offices of Randall E. Turner, PLLC
Edward S. Gaytan
Gaytan Legal
Tyler G. Thomas
Thomas Legal, PLLC
5017 El Campo Avenue
Fort Worth, TX 76107

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Plaintiff/ Appellant:	Diana Garza, Kingsville, TX
Appellant's Trial and Appellate Counsel:	Randall E. Turner **LAW OFFICES OF RANDALL E. TURNER, PLLC** 5017 El Campo Avenue Fort Worth, TX 76107 Direct Line: (817) 420-9690 randy@randyturner.com Edward S. Gaytan **Gaytan Legal** 5017 El Campo Avenue Fort Worth, Texas eddie@gaytanlegal.com Tyler G. Thomas **Thomas Legal, PLLC** 5017 El Campo Avenue Fort Worth, Texas 76107 tyler@thomaslegaltexas.com
Defendant/ Appellee:	Jose Ochoa, Kingsville, TX
Defendant's Trial and Appellate Counsel:	Patrick Wolter Kristina Fernandez Donnell, Kieschnick, Wolter & Gamez, PC 555 N. Carancahua, Suite 400 Corpus Christi, Texas 78401

TABLE OF CONTENTS

INDEX OF AUTHORITIES

State Cases

STATEMENT OF THE CASE

***Nature of the case*:** Personal injury action against dog owner for injuries sustained when Plaintiff swerved her car to avoid Defendant's unrestrained dog running onto roadway, causing her vehicle to roll over, causing grievous, multiple injuries. [CR 4-5]

***Course of proceedings*:** Defendant filed a no-evidence motion for summary judgment on Plaintiff's negligence and negligence *per se* causes of action. [CR 12]

***Final disposition*:** Trial court signed bare-bones Order Granting Defendant's No Evidence Motion for Summary Judgment on December 14, 2019. No grounds listed. [CR 43]

ISSUES PRESENTED

Issue 1: Whether the trial court erred in rendering a no-evidence summary judgment against Plaintiff where Plaintiff submitted more than a scintilla of evidence to support each of the challenged elements. *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

STATEMENT OF FACTS

On October 4th, 2016, as Plaintiff Diana Garza was driving past Defendant Jose Ochoa's property on F.M.772, several dogs ran from Defendant's property into the roadway, causing her to swerve to avoid striking one or more. [CR 26] Her car left the roadway and rolled over. *Id*. She sustained injuries serious enough that she was transported from the scene by emergency helicopter to the trauma center at CHRISTUS Spohn Memorial Hospital. [CR 5] Those injuries included a concussion and fractures of her skull, spine and ribs, resulting in months of pain and therapy. *Id*.

Diana was able to identify at least one of the dogs as belonging to

Defendant Ochoa. [CR 26-27]

One of Defendant Ochoa's neighbors, Teresa Caldera, regularly went walking every evening and her route took her past Ochoa's property. [CR 28; App. Tab B] She stated: "For roughly three years leading up to the accident there were three dogs that Mr. Ochoa owned that would run from his house, up his driveway, and out to the road every time I walked or drove by. For years these dogs did this to pretty much everyone that walked or drove by and it was a constant nuisance in the neighborhood. There was no fence that kept the dogs from running out into the road, and I never saw him make any effort to restrain the dogs on his property or keeping [sic] them from running at large off of his property." [CR 28; App. Tab B] This witness likewise identified the same dog identified by Plaintiff Garza as one of the three dogs that would run onto the road from Defendant's property. [CR 28-29; App. Tab B] She also confirmed that the dog was owned by Defendant Ochoa. *Id*.

Garza sued Ochoa for failing to keep his dogs from running onto

the road under common law negligence and negligence per se, believing the Defendant's property was within the city limits of Kingsville. [CR 4] Defendant Ochoa filed a no-evidence motion for summary judgment, challenging the elements of Duty and Breach, but not the element of ownership of the dogs. Garza filed a Response [CR 22], and Defendant filed a Reply and Objections. [CR 30] Defendant never obtained a ruling on any of his objections to Garza's summary judgment evidence.

The trial court granted Defendant's no-evidence motion for summary judgment by written order signed December 14, 2019, without stating grounds therefor. [CR 43] This appeal followed.

INTRODUCTION

Texas dog owners owe a common law duty to exercise reasonable care to avoid foreseeable injury to others by their dog. Defendant Ochoa breached that duty by failing to keep his dogs out of the road, and Diana Garza was seriously injured as a result. The trial court erred in granting defendant Ochoa's no-evidence motion for summary judgment (MSJ) on the elements of duty and breach because Garza presented

more than a scintilla of evidence on each challenged element. The no-evidence summary judgment should therefore be reversed.

SUMMARY OF THE ARGUMENT

When reviewing a no-evidence summary judgment, the court examines the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. Such a review requires reversal of the summary judgment in this case.

Defendant Ochoa had a well-recognized common law duty to exercise reasonable care to prevent his dogs from injuring others, including by running into the road and causing a driver to swerve. The automobile crash and serious injuries to Diana Garza were easily foreseeable, and therefore imposed a duty on Ochoa to do whatever was reasonably necessary to keep them out of the road. As the owner or possessor of the dogs he was required to know their propensity to run into the road every time a car drove past, and to do something about the dangerous situation that his negligence created. This is especially true

here, where the dogs had been observed running into the road at cars daily for at least three years before the accident at issue.

Determining what a reasonable person would have done or should have known is a question of fact which precludes summary judgment.

Texas courts have imposed negligence liability on owners of other types of animals that wander onto highways and cause accidents. A domestic dog should be treated no differently.

Many duties are imposed by for the benefit of the driving public. The principles utilized by the Supreme Court in *El Chico v Poole* to impose a duty not to overserve a bar patron also support a duty to keep one's dogs off the highway. If a party negligently creates a situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby. Ochoa negligently created such a situation by his failure to keep his doge from running onto the highway.

These duties already exist in Texas law, so it should not be

necessary to create a new duty. However, if a new duty does need to be created it finds ample support in Texas law. The extent of the risk from Defendant Ochoa's conduct is high, as is the foreseeability and likelihood of injury, whereas the social utility is zero. The magnitude of the burden of guarding against the injury is slight, and the consequences of placing the burden on the defendant are no more than on any other party guilty of negligence. Moreover, Defendant Ochoa had the absolute right to control his dogs and keep them off the highway. Imposition of a duty was clearly justified under these facts.

Regardless of the source of his duty to the driving public and Diana Garza, Ochoa breached it by allowing his dogs to run onto the road to chase cars multiple times a day, every day.

Although he filed objections to Garza's summary judgment evidence, Ochoa failed to get a written ruling on those objections; therefore, all his objections were waived and not preserved for review.

Teresa Caldera's Declaration in support of Garza's Response demonstrated personal knowledge by personal, daily observations, and

her logical conclusions were supported by those observed facts. The declaration was thus unobjectionable and competent summary judgment proof.

The "Free Range" cases relied upon by Defendant actually support his liability by making an exception for animals with a propensity to leave their property and cause damage elsewhere, like Ochoa's dogs. And the Stock Laws don't apply at all.

The no-evidence summary judgment should have been denied because Diana Garza submitted more than a scintilla of evidence to prove each element challenged in the Motion. That summary judgment should now be reversed and remanded for trial.

ARGUMENT AND AUTHORITIES

> "The duty owed by a dog owner is the general duty to exercise reasonable care to avoid foreseeable injury to others."

Ogden v. Estate of Pettus, 03-97-00702-CV, 1998 WL 766766, at *2 (Tex. App.—Austin Nov. 5, 1998, no pet.).

I. The Trial Court Erred in Granting the No-evidence Motion for Summary Judgment Because Plaintiff Produced More than a Scintilla of Evidence on Each Challenged Element of Her Cause of Action.

A. Standards of Review–No-evidence Summary Judgment

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(I); *Pulte Homes of Tex., L.P. v. Tex. Tealstone Resale, L.P.*, 2017 WL 1738023, at *12 (Tex. App.—Fort Worth, no pet.). The motion must specifically state the elements for which there is no evidence. *Id*., citing *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, the court examines the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Id*., citing *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). The court reviews a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton v. Wilson*, supra, 249 S.W.3d at 426. The

court credits evidence favorable to the nonmovant if reasonable jurors could, and disregards evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus*., 286 S.W.3d at 310. If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), cert. denied, 541 U.S. 1030 (2004).

"Less than a scintilla of evidence exists when the evidence is so weak that it does nothing more than create a mere surmise or suspicion of a fact. *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence would enable reasonable and fair-minded people to reach different conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A genuine issue of material fact is raised by presenting evidence on which a reasonable jury could return a verdict in the nonmovant's favor. *Abdel–*

Hafiz v. ABC, Inc., 240 S.W.3d 492, 504–05 (Tex. App.–Fort Worth 2007, pet. denied)..." *Pulte Homes of Tex.*, 2017 WL 1738023, at *13.

B. Ochoa had a duty to prevent his dogs from continually running into the roadway.

Diana Garza originally sued Ochoa for both ordinary negligence and negligence per se. Her negligence per se cause of action was based on the belief that Ochoa's property was located within the City of Kingsville and therefore subject to the City's ordinance requiring owners to confine or restrain their dogs to the owner's property and not allow their dogs to run at large. Much of Ochoa's No-Evidence Motion seeks to demonstrate that his property is not in the City. It has since been determined that Ochoa's property lies outside of the city limits, so negligence per se cannot apply.

Garza also sued under a general negligence theory, alleging that Ochoa was negligent in:

a. Failing to restrain the dogs;

b. Allowing the dogs to roam freely;

c. Failing to keep the dogs on a leash while off his property;

d. Failing to take measures to prevent the dogs from leaving his property; and

e. Failing to close the gate at the entrance of the property, allowing the dogs to wander into the roadway. [CR 5]

Ochoa's Motion asserted he had no duty to Garza, casting this as "no evidence" of duty. However, under the common law, including the *Hayes* case heavily relied upon by Defendant Ochoa, he had a duty to drivers and others to keep his dogs from running into the roadway from his property.

The threshold inquiry in a negligence case is duty. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex.1987). The plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the defendant to establish liability in tort. *Id*. Duty is a question of law for the court to decide. *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex.1999).

In *Marshall v. Ranne*, 511 S.W.2d 255 (Tex.1974), the Texas Supreme Court recognized a duty owed by the owner or possessor of a

non-vicious animal to exercise reasonable care to prevent the animal from injuring others. *Marshall*, 511 S.W.2d at 258, citing Restatement (Second) of Torts § 518 (1938).[1] Whether a duty exists depends on whether the owner had actual or constructive knowledge of the danger presented by the animal. *Dunnings v. Castro*, 881 S.W.2d 559, 563–64 (Tex.App.-Houston [1st Dist.] 1994, writ dism'd). Foreseeability is satisfied by showing a person of ordinary intelligence should have anticipated the danger to others by the actor's negligent behavior. *Searcy v. Brown*, 607 S.W.2d 937, 942 (Tex.Civ.App.–Houston [1st Dist] 1980, no writ).

An owner has a duty to exercise ordinary care over his dogs to prevent injury to another. *Osburn v. Baker*, 2020 WL 2441426, at *3 (Tex. App.—San Antonio 2020, no pet. h.)("Texas jurisprudence has long recognized that domestic dog owners owe a duty to exercise reasonable care to prevent their dogs from injuring others."); *Ogden v. Estate of*

[1] [O]ne who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if, (a) he intentionally causes the animal to do the harm, or (b) he is negligent in failing to prevent the harm. RESTATEMENT

Pettus, 1998 WL 766766, at *2 (Tex. App.—Austin 1998, no pet.)("The duty owed by a dog owner is the general duty to exercise reasonable care to avoid foreseeable injury to others."). No case has been found that limits such injuries to bites and scratches. In *Dunnings v. Castro* the plaintiff was startled when the defendant's tethered dog unexpectedly lunged at him, fell backwards and injured his back, but was not bitten. *Dunnings,* 881 S.W.2d at 560. The Court recognized the owner could be held liable for negligent handling. *Id.* at 563.

"The foremost consideration in determining the existence of a duty is the foreseeability of the risk of injury." *Ogden v. Estate of Pettus*, supra, citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex.1987). Here witness Teresa Caldera declared that she walked past Ochoa's property every evening for at least three years preceding the accident, and that every time she walked or drove by Ochoa's property three dogs would run from his house, down his driveway and into the road. [CR 28; App. Tab B] "For years these dogs did this to pretty much everyone that walked or drove by and it was a constant nuisance in the neighborhood.

(SECOND) OF TORTS § 518 (1977).

There was no fence that kept the dogs from running out into the road, and I never saw him make any effort to restrain the dogs on his property or keeping [sic] them from running at large off of his property." *Id.* Thus an accident resulting from a driver swerving to avoid hitting the dogs, or any of them, was easily foreseeable.

"The Restatement (Second) of Torts § 518 addresses the liability for harm caused by domestic animals that are not abnormally dangerous. The comment to that section states:

> **Animals dangerous under particular circumstances.** One who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. He is therefore required to realize that even ordinary gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm."

Dunnings v. Castro, supra, 881 S.W.2d at 562; see also *Allen ex rel. B.A. v. Albin*, 97 S.W.3d 655, 666 (Tex. App.—Waco 2002, no pet.), recognizing that the owner owed a duty to exercise reasonable care to prevent her dog under particular circumstances from injuring others, a legal duty that was acknowledged by the Supreme Court in *Marshall v.*

Ranne, supra. Ochoa was thus required to know the normal habit and tendency of his dogs to run out into the roadway any time a vehicle passed his property. According to witness Caldera this happened multiple times per day, every day, for at least three years before the accident. With this knowledge came the foreseeability that the dogs could cause a driver to swerve to avoid hitting them and cause an accident. Foreseeability is satisfied by showing a person of ordinary intelligence should have anticipated the danger to others by the actor's negligent behavior. *Searcy v. Brown*, supra, 607 S.W.2d at 942. Defendant should have anticipated the danger to drivers created by his negligent failure to prevent his dogs from running from his property onto the road.

The elements of an action for injuries caused by the negligent handling of an animal are: (1) the defendant was the owner or possessor of an animal; (2) the defendant owed a duty to exercise reasonable care to prevent the animal from injuring others; (3) the defendant breached that duty; and (4) the defendant's breach proximately caused the

plaintiff's injury. *Allen ex rel. B.A. v. Albin*, supra, 97 S.W.3d at 660; Unlike for strict liability, the plaintiff does not have to prove that the animal was vicious or dangerous. *Id*.

Ochoa's no-evidence MSJ challenged the evidence to support elements 2 and 3; duty and breach. It did not challenge element 1; ownership or possession of the dogs. [CR 14, 16] Because a motor vehicle accident caused by his dogs running into the road was reasonably foreseeable, Ochoa had a duty to take reasonable steps to prevent such injuries to others or their property. *Ogden v. Estate of Pettus*, supra, 1998 WL 766766, at *2. However, determining what a reasonable person would have done or should have known are normally questions of fact, precluding summary judgment. *Id.* at *4.

This duty of an owner or possessor to exercise reasonable care to prevent his dog from injuring others is not a new one, and does not require this Court to create new duties. Rather, this duty is already recognized by Texas law. *Allen ex rel. B.A. v. Albin*, supra, 97 S.W.3d at 666 and cases discussed above.

Ogden v. Estate of Pettus, supra, 1998 WL 766766 is instructive. There the dog ran into the street and attacked a bicyclist pulling his small child in a carrier. The court held that the affidavits from the owners that they observed no dangerous propensities in the dog in other situations failed to address it's propensities or past conduct in chasing moving objects while running at large. *Id*. at *4. There is no principled difference between holding an owner liable for injuries inflicted by his dog running into the street and biting someone, and holding an owner liable for injuries inflicted by his dog running into the street and causing a driver to have an accident maneuvering to avoid striking the dog. In each instance the negligent act or omission is allowing the dog to run at large and into the street. In each instance the potential for injury to a person using the street is foreseeable. Foreseeability does not require the actor anticipate the particular accident, but only that he reasonably anticipate the general character of the injury. *El Chico Corp. v. Poole*, supra, 732 S.W.2d at 313. This Defendant certainly could and should have done.

Texas courts have applied the reasonable care standard to owners of other types of animals which have wandered onto roadways and caused accidents. In *Weaver v. Brink*, 613 S.W.2d 581 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.), the evidence showed that the defendant's cattle regularly escaped his inadequate fences and wandered onto the Interstate right-of-way. *Id.* at 582-83. The trial court found that the defendant failed to exercise ordinary care in keeping his cattle from creating an unreasonable danger on the Interstate Highway, and that such failure constituted negligence which was the proximate cause of the accident. *Id.* at 582. The court of appeals affirmed the judgment for the injured plaintiff driver whose truck struck defendant's cow on the highway.

In *Warren v. Davis*, 539 S.W.2d 907, 909 (Tex. Civ. App.—Corpus Christi 1976, no writ), defendant's escaped bull ran onto the road and struck the plaintiff's car, causing an accident fatal to both the bull and the driver. *Id.* at 909. This Court held that this evidence constituted common law negligence that proximately caused the plaintiff's death,

and affirmed the judgment against the bull's owner. *Id.* at 910-11. The result should be the same for a dog that runs onto the road and causes an accident.

More recently, this Court again recognized that owners of animals can be liable for negligence if their animals wander onto highways and cause accidents, although holding the circumstantial evidence in that case was insufficient to prove the defendant's ownership of the horse. *Fuller v. Graham*, 2000 WL 34410006, at *2 (Tex. App.—Corpus Christi 2000, no pet.). There was no evidence that defendants' pens were down or gates were open at the time of the accident, or that defendants' horses had a propensity for escaping, and there were no facts or circumstances that could have been said to have reasonably alerted defendants to the possibility that a horse had escaped the fences or gates, or that would show that defendants failed to exercise due care.

Here, by contrast, the undisputed evidence is that there was no fence whatsoever to contain defendant's dogs and that they had propensities to run out into the road any time a pedestrian or vehicle

passed by his property. The law discussed above charges defendant with knowledge of these tendencies, and common law negligence principles required Ochoa to exercise due care to see that his dogs did not present a danger to drivers on the road. Ochoa's breach of that duty was a direct and proximate cause of Diana Garza's injuries.

C. *El Chico Corp. v. Poole* requires recognition of Ochoa's duty to the driving public.

Although the precise duty recognized by the Texas Supreme Court in *El Chico Corp. v. Poole* has been superseded by statute, the general principles of common law negligence used by the Court in determining whether to recognize a new duty are still valid, and they compel imposing a duty to the driving public on Ochoa in this case.

El Chico dealt with the liability of a seller of alcoholic beverages to a motorist injured or killed when a patron that the seller knows or should know is intoxicated operates a motor vehicle and collides with the innocent motorist. 732 S.W.2d at 308. At the time the common law imposed no liability on the seller in such situations. *Id*. at 309. The Court began its analysis by stating "the common law is not frozen or

stagnant, but evolving, and it is the duty of this court to recognize the evolution."*Id*. at 310. "Our courts have consistently made changes in the common law of torts as the need arose in a changing society." *Id*.

Acknowledging that duty is the threshold inquiry, the Court stated generally:

> ... if a party negligently creates a situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby.

Id. at 311, citing *Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109, 110 (1942). Ochoa negligently created a situation where his unrestrained dogs were allowed to run into the street at will whenever the urge struck them, and every time a vehicle drove past. It should have reasonably appeared to him that drivers on that street might be injured trying to avoid hitting the dogs. "Our everyday use and reliance on the automobile is unquestionable." *Id*.

The Court held "[t]he duty here is merely the application of the general duty to exercise reasonable care to avoid foreseeable injury to

others." *Id*. Garza argues for the same application in this case. Acknowledging that the legislature had just passed a statute addressing dramshop liability, the Court nevertheless stated "we as a court cannot cower from our obligation to recognize a legitimate cause of action grounded in negligence and based upon every person's duty to exercise reasonable care to avoid a foreseeable risk of injury to others." *Id*. at 315. "Liability is grounded in the public policy behind the law of negligence which dictates every person is responsible for injuries which are the reasonably foreseeable consequence of his act or omission." *Id*.

The Court thus recognized a duty of an alcoholic beverage licensee to the general motoring public not to overserve a patron the licensee knows could potentially get behind the wheel of a motor vehicle, and reversed the summary judgment for El Chico. This Court should recognize a similar duty to the driving public not to knowingly allow one's dogs to run into the street to chase cars all day long, and should reverse the summary judgment granted to Ochoa. See also *Gooden v. Tips*, 651 S.W.2d 364, 369 (Tex.App.—Tyler 1983, no writ), holding

that, under proper facts, a physician can owe a duty to use reasonable care to protect the driving public where the physician's negligence in diagnosis or treatment of his patient contributes to plaintiff's injuries. The physician had prescribed a powerfully-intoxicating drug to a patient with a history of substance abuse, who drove under the influence and collided with the plaintiffs' car. The physician had not warned his patient not to drive under the influence. The court held that the plaintiffs' injuries were reasonably foreseeable to the physician and reversed the summary judgment on the pleadings in his favor. *Id*. at 370.

D. If a new duty must be created, it has ample support in Texas law.

As stated above, Garza contends that existing Texas common law on the duty of dog owners is broad enough to impose liability on Ochoa under the facts of this case. However, if the Court determines that a new duty must be created, such a duty has ample support in Texas law.

The Supreme Court has set out factors that a court should consider in deciding whether to impose a new common law duty. Among

other factors, courts consider the extent of the risk involved, "the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex.1993), quoting *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1991); see also *Morris v. Tex. Parks & Wildlife Dep't*, 226 S.W.3d 720, 729 (Tex. App.—Corpus Christi 2007, no pet.).

As demonstrated by the facts of this case the extent of the risk involved in allowing one's unrestrained dogs to run onto the highway is high. The injuries suffered by Diana Garza in the crash were so severe that she had to be transported from the scene by helicopter ambulance. The same or even more serious injuries can foreseeably occur to other drivers and their passengers if Ochoa continues to allow this behavior. The extent of the risk therefore weighs heavily in favor of a duty.

The foreseeability of this type of accident and the likelihood of serious injury or death has already been discussed in this Brief, and

also weighs heavily in favor of imposing a duty under these facts.

The social utility of Ochoa's conduct is zero. Society gains nothing when Ochoa's dogs are allowed to run into the road whenever they like, creating conditions for additional accidents. For that matter, it does not appear that Ochoa derives any benefit from this conduct. Animal welfare advocates would likely see a negative social utility from conduct that puts the dogs themselves at a risk that they are poorly equipped to evaluate. The total lack of social utility of Ochoa's conduct weighs very heavily in favor of imposing a duty to keep his dogs off the highway.

The magnitude of the burden of guarding against the injury is moderate to low. The owner need only install an appropriate fence to keep the dogs out of the road, and keep the gate closed. Owners of larger tracts need not fence their entire frontage; they can block off a portion of their property for their dogs. Electronic fencing with a shock collar can evidently contain dogs without a physical structure. The owner in *Smith v. Province*, 2019 WL 1870105, at *1 (Tex. App.—Amarillo 2019, no pet.) simply placed chicken wire along the bottom

portion of the gate to keep two of his smaller Dachshunds in the yard. The magnitude of the burden is moderate, at worst. Indeed, most cities and towns in Texas have ordinances requiring owners to prevent their dogs from running at large, so the majority of dog owners are already subject to these requirements.

Finally, the consequences of placing the burden on the defendant are to make the defendant responsible for the consequences of his voluntary choice to not confine his dogs to his own property, or at least to keep them off of the highway. As discussed above, "Texas jurisprudence has long recognized that domestic dog owners owe a duty to exercise reasonable care to prevent their dogs from injuring others." *Osburn v. Baker*, 2020 WL 2441426, at *3 (Tex. App.—San Antonio 2020, no pet. h.). If his property were located inside city limits he would already owe this duty as a matter of law under negligence per se.

Moreover, another factor sometimes considered is whether a right to control the actor whose conduct precipitated the harm exists. *Graff v. Beard*, 858 S.W.2d at 920; *Morris v. Tex. Parks & Wildlife Dep't*, 226

S.W.3d at 729. Ochoa has an absolute right to control the conduct of his dogs short of animal cruelty. As contended by Garza herein, Ochoa has not only the right but the legal duty to keep his dogs from running onto the highway. This factor also weighs heavily in favor of creation of a duty.

On balance, the factors above weigh in favor of creating a duty for dog owners to use ordinary care to keep their dogs off the highway. Ochoa's "no-duty no-evidence" MSJ should have been denied, and should now be reversed in this Court.

E. Ochoa breached his duty.

Whether this Court decides that Ochoa's duty to Diane Garza arose under existing common law or creates a new duty, the facts of this case show that duty was breached. If this had been an isolated instance where the dogs dug under the fence and escaped before Defendant discovered the hole it might be a different story, but it wasn't. This was something that happened every day for at least three years before the crash. Defendant knew or should have known of the tendencies of his dogs to run into the road, yet he did nothing to prevent them from doing

so. An accident and injuries such as Diana Garza suffered were easily and reasonably foreseeable, yet Defendant Ochoa did not do anything to prevent the harm. The trial court erred in granting the summary judgment.

F. Ochoa waived all his objections to Garza's summary judgment evidence by failing to obtain a written ruling thereon.

Ochoa filed numerous objections to Garza's summary judgment evidence. [CR 30] However, he failed to get a written ruling on his objections, thereby waiving all of them. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164, 166 (Tex. 2018). This certainly holds true for his "lack of personal knowledge" objections, which cannot now be raised on appeal. [CR 33-34] *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.–Dallas 2004, no pet.); *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 8 (Tex. App.—Austin 1994, writ denied) and cases there cited.

G. Caldera declaration demonstrates personal knowledge.

Defendant waived his "no personal knowledge" objections to Garza's summary judgment declarations by failing to obtain a written

ruling thereon. *Id*. Even if he had obtained a written ruling, it would have been an erroneous one, because Caldera demonstrated personal knowledge.

In paragraph 1.9 of his Reply to Garza's Response Defendant claims the declaration states insufficient facts concerning his ownership of the dogs and points out that she lives several houses down from his property. He also complains she doesn't state how often she passes by the property. These statements either ignore or actively misrepresent to this Court the plain language of the declaration.

Caldera stated that for at least three years prior to the accident she went walking ***every night***, and her route took her past Defendant's property. [CR 28; App. Tab B] She personally observed the same three dogs run from Defendant's house, up his drive and out into the road every time she or anyone else passed by. Personal observation is personal knowledge. The declaration states how she obtained the facts she stated–by direct, daily personal observation. Her statements certainly amount to more than a scintilla of evidence and should have

defeated Defendant's no-evidence MSJ. The trial court erred in ruling otherwise.

Ochoa did ***not*** challenge the element of ownership or possession of the dogs in his no-evidence MSJ–only the elements of duty and breach.

When considering a motion for summary judgment, "Evidence favorable to the nonmovant will be taken as true and every reasonable inference must be indulged in nonmovants, and any doubts resolved in their favor." *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *Torres v. Mid-State Tr. II*, 895 S.W.2d 828, 831 (Tex. App.—Corpus Christi 1995, writ denied); *C.S.R., Inc. v. Mobile Crane Inc*., 671 S.W.2d 638, 642 (Tex. App.—Corpus Christi 1984, no writ). When a witness observes the same dogs running from the same house down the same drive and into the same road every evening for three years, it is a reasonable inference that the dogs are owned or possessed by the occupant of that property, and the trial court and this Court are required to indulge that inference in Garza's favor. Any doubts should likewise have been resolved in her favor. The trial court's failure to do so constitutes

reversible error.

H. The Caldera declaration demonstrates underlying facts and is not conclusory.

In paragraph 1.11 and 1.12 Defendant objected to Caldera's "statements as to the dog and its ownership" and "that the dog has been a nuisance in the neighborhood for years" as being conclusory. However, he failed to get a written ruling on his objections, thereby waiving all of them. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164, 166 (Tex. 2018).

He complains that "she provides no information about how often she passes by the house." This statement either ignores or actively misrepresents to this Court the plain language of the declaration.

Caldera stated that for at least three years prior to the accident she went walking ***every night***, and her route took her past Defendant's property. [CR 28; App. Tab B] She personally observed the same three dogs run from Defendant's house, up his drive and out into the road every time she or anyone else passed by. The photo attached to her declaration depicts one of the dogs which ran from Defendant's house

into the road when she walked past the property shortly after the accident.

"A conclusory statement is one that does not provide the underlying facts to support the conclusion." *Pulte Homes of Tex., L.P. v. Tex. Tealstone Resale, L.P.*, 2017 WL 1738023, at *7 (Tex. App.—Fort Worth 2017, no pet.), quoting *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.–Texarkana 2000, no pet.). Conclusions in and of themselves are not objectionable, but to constitute proper summary judgment evidence, they must be "[l]ogical conclusions based on stated underlying facts." *Id.,* citing *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.–Dallas 2004, no pet.). Thus, a conclusory statement in an affidavit is not proper summary judgment proof when there are "no facts to support the conclusion." *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.–Houston [1st Dist.] 1997, no writ), superseded on other grounds by rule as stated in *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.–Houston [1st Dist.] 2008, no pet.).But when conclusions are based on stated underlying facts in the record, logical

conclusions are proper in both lay and expert testimony. *Id.* at 586; *Thompson v. Curtis*, 127 S.W.3d at 450.

Caldera's declaration stated the underlying facts supporting her "conclusion" that the dogs were owned or at least possessed by Defendant Ochoa. The dogs ran from Ochoa's house, down his drive and into the road every day when she walked past his property, and also whenever pretty much anyone else drove or walked past. Since it was based on stated underlying facts which she personally observed for at least three years, her logical conclusion was proper summary judgment evidence. It certainly is more than a scintilla of evidence that Ochoa owned or possessed the dogs, and should have precluded summary judgment.

Although not terribly relevant, Caldera's logical conclusion that Ochoa's dogs had been "a constant nuisance in the neighborhood" was likewise supported by the underlying facts discussed above, and therefore not subject to objection as a conclusory statement.

II. The "Free Range" cases relied upon by Defendant actually support his liability.

Defendant relies heavily on *Hayes v. Blake*, 2000 WL 1028206, at *5 (Tex. App.—Austin 2000, no pet.) and *Gibbs v. Jackson*, 990 S.W.2d 745, 747 (Tex.1999), for the proposition that: "Absent a duty imposed by a statute, there is no common law duty to restrain an animal that has not exhibited violent or vicious tendencies. In Texas 'it is the right of every owner of domestic animals in this state, not known to be diseased, vicious, ***or breachy*** to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood.'" *Id*. (Emphasis added) The problem with this reliance is that Ochoa's dogs fall within the rule's exception–they are the very definition of "breachy" given Ochoa's failure to make any efforts to confine them to his property.

The term "breachy" refers to livestock of a "fence-breaking nature." *Phillips v. Crow*, 199 S.W. 851 (Tex. Civ. App.—Amarillo 1917, no writ). It refers to livestock that either breach their owner's fence to escape onto other property, or breach the neighbor's fence to damage his lands and crops. The common law charged one who did not maintain his

fence in sufficient strength to turn non-breachy cattle with contributory negligence when said cattle broke his fence and damaged his crops. *Id*. at 852. Conversely, the owner of cattle known to be breachy was liable to his neighbor for the trespass of his cattle through his inadequate fence and onto his neighbor's land. *Id*.

Defendant Ochoa's fence was not just inadequate; it was non-existent. Yet he is charged with knowledge of his dogs' tendencies to run onto the road every time a car or pedestrian passes by. *Dunnings v. Castro*, supra, 881 S.W.2d at 562; *Allen ex rel. B.A. v. Albin*, supra, 97 S.W.3d at 666, both quoting RESTATEMENT (SECOND) OF TORTS § 518 (1977). Under these facts and the common law discussed herein, Ochoa had a duty to keep his dogs from running out into the road, and he breached that duty by failing to restrain his dogs on his property. There was more than a scintilla of evidence on the elements of duty and breach identified by Defendant in his no-evidence MSJ. Garza might or might not prevail at a trial on the merits, but she produced competent summary judgment evidence sufficient to defeat Defendant's no-

evidence MSJ. That judgment should be reversed and the case remanded for trial.

III. The "Stock Laws" do not apply to domestic dogs or cats.

Defendant makes several references to the "Stock Laws" in arguing that he had no duty to restrain his dogs on his own property. Garza would simply point out that Stock Laws have no application to dogs or cats, because neither are included in the definition of "Livestock" to which those laws do apply. Tex. Agric. Code §1.003(3).

CONCLUSION

There is ample evidence that Defendant Ochoa breached his common law duty to exercise reasonable care to control his dogs so as to avoid foreseeable injury to others–certainly more than a scintilla. That duty already exists under Texas common law, but if a new duty must be created there is ample evidence to support that as well. Ochoa's negligence in failing to keep his dogs from running into the highway was the direct and proximate cause of Diana Garza's crash and serious injuries. Were his property located within the city limits that duty would be fixed as a matter of law by an ordinance forbidding owners

from allowing their dogs to run at large, and he would be liable in negligence per se. however, his duty under the common law remains. The trial court erred in granting Ochoa's no-evidence motion for summary judgment. It's judgment should be reversed and the case remanded for trial.

PRAYER

WHEREFORE Appellant Diana Garza respectfully prays that the no-evidence summary judgment below be REVERSED and that the cause be REMANDED for further proceedings and trial on the merits.

Respectfully submitted,

/s/ Randall E. Turner

Law Office of Randall E. Turner
SBN: 20328310
5017 El Campo Ave.
Fort Worth, Texas 76107
Telephone: 817-420-9690
Fax: 817-887-5717
randy@randyturner.com

Edward S. Gaytan
Gaytan Legal
Texas Bar No. 24087572
5017 El Campo Avenue
Fort Worth, Texas

Telephone: 817-420-9690
Fax: 817-887-5717
eddie@gaytanlegal.com

Tyler G. Thomas
Thomas Legal, PLLC
Texas Bar No. 24083964
5017 El Campo Avenue
Fort Worth, Texas 76107
Telephone: 817-420-9690
Fax: 817-887-5717
tyler@thomaslegaltexas.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief contains 6,795 words, excluding the items listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Randall E. Turner

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Appellant's Brief was served upon the following counsel for Appellee Jose Ochoa by e-service through the Pro Doc e-Filing service and e-File Texas in accordance with the Texas Rules of Appellate Procedure, this 22nd day of June, 2020:

Patrick Wolter
Kristina Fernandez

Donnell, Kieschnick, Wolter & Gamez, PC
555 N. Carancahua, Suite 400
Corpus Christi, Texas 78401

/s/ Randall E. Turner

APPENDIX

Tab A- Order Granting Summary Judgment

E-Filed for Record
9/9/2019 11:41 AM
Jennifer Whittington, District Clerk
Kleberg County, TX
By: Amelia Carbajal

CAUSE NO. 18-417-D

DIANA GARZA	§	IN THE DISTRICT COURT
	§	
	§	
VS.	§	105TH JUDICIAL DISTRICT
	§	
	§	
JOSE OCHOA	§	KLEBERG COUNTY, TEXAS

FINAL JUDGMENT AND ORDER GRANTING DEFENDANT'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENCE CLAIMS AGAINST DEFENDANT JOSE OCHOA

On this day the Court having considered Defendant, Jose Ochoa's, No Evidence Motion for Summary Judgment on Plaintiff's Negligence Claims Against Defendant Jose Ochoa, and responses and replies thereto, if any, is of the opinion that said Motion should be **GRANTED.**

IT IS, THEREFORE, ORDERED that Defendant, Jose Ochoa's, No Evidence Motion for Summary Judgment on Plaintiff's Negligence Claims Against Defendant Jose Ochoa, is GRANTED.

IT IS FURTHER ORDERED that Plaintiff Diana Garza **TAKE NOTHING** by her suit against Jose Ochoa, and that Defendant have his costs.

All relief not herein expressly granted is denied. This is a final and appealable judgment

SIGNED this 14th day of Dec., 2019.

JUDGE PRESIDING

N:\ATTYS\rrk\Cases\TFB\Garza Diana v. Ochoa\Pldgs\WORD DOCS\ORD_prpsd_no-evdnc_msj.doc

Tab B- Teresa Caldera Declaration

CAUSE NO. 18-417-D

DIANA GARZA	§	**IN THE DISTRICT COURT**
	§	
Vs.	§	**105th JUDICIAL DISTRICT**
	§	
JOSE OCHOA	§	
	§	**KLEBERG COUNTY, TEXAS**

DECLARATION OF TERESA CALDERA

My name is Teresa Caldera and I live at 180 W. FM 772, in Kingsville, Texas. I have lived at this address for over twenty years. I am a neighbor of Jose Ochoa, who lives at 134 W. FM 772 in Kingsville, Texas.

For years leading up to Diana Garza's car accident, I would go walking every night and would walk by Jose Ochoa's house. For roughly three years leading up to her accident there were three dogs that Mr. Ochoa owned that would run from his house, up his driveway, and out to the road every time I walked or drove by. For years these dogs did this to pretty much everyone that walked or drove by and it was a constant nuisance in the neighborhood. There was no fence that kept the dogs from running out into the road, and I never saw him make any effort to restrain the dogs on his property or keeping them from running at large off of his property.

The dog in the picture attached is one of the three dogs that would run out to the road, and I have personal knowledge that this dog was owned by Jose Ochoa. I took the attached picture of the dog when it ran out past the fence as I was walking by the property shortly after the accident.

My name is Teresa Caldera, and my address is 180 W. FM 722, in Kingsville, Texas in the United States of America. I declare under penalty of perjury that the foregoing is true and correct and within my personal knowledge.

Executed in Kleberg County, State of Texas, on the 3rd day of October, 2019.

Teresa Caldera

Teresa Caldera


SLOW
CHILDREN

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Randall Turner on behalf of Randall Turner
Bar No. 20328310
randy@randyturner.com
Envelope ID: 43932057
Status as of 07/14/2020 16:07:22 PM -05:00

Associated Case Party: Diana Garza

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Wieneskie		pfw1@me.com	6/22/2020 2:27:35 PM	SENT
Tyler Thomas		Tyler@ThomasLegalTexas.com	6/22/2020 2:27:35 PM	SENT

Associated Case Party: Jose Ochoa

Name	BarNumber	Email	TimestampSubmitted	Status
Clara McGuire		cmcguire@dakpc.com	6/22/2020 2:27:35 PM	SENT
Sandra Sterba-Boatwright		ssterba@dakpc.com	6/22/2020 2:27:35 PM	SENT
DAK DAK		dakefilesvc@dakpc.com	6/22/2020 2:27:35 PM	SENT
Dana Hyatte		dhyatte@dakpc.com	6/22/2020 2:27:35 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Wolter		pwolter@dakpc.com	6/22/2020 2:27:35 PM	SENT